United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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76-1487

To be argued by
JONATHAN M. MARK

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1487

UNITED STATES OF AMERICA,

Appellee,

—against—

WALLACE JARVIS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Eastern District of New York.

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Preliminary Statement

Appellant Wallace Jarvis appeals from a judgment of conviction entered on September 24, 1976, after a jury trial in the United States District Court for the Eastern District of New York (Pratt, *J.*) at which Jarvis was found guilty of armed bank robbery in violation of 18 U.S.C. §§ 2113(a) and (d). Jarvis was sentenced to five years imprisonment and is currently on bail pending this appeal.

On appeal, appellant claims that palmprint evidence and eyewitness identifications should have been excluded as fruits of an allegedly unlawful arrest and that the eyewitness identification techniques were impermissibly suggestive.

Statement of Facts

A. The Pre-Trial Suppression Hearing

On April 8, 1976, a Grand Jury sitting in the Eastern District of New York indicted the appellant and one Michael Blanchard for the February 2, 1976 armed robbery of the European-American Bank located at 31-21 Thompson Avenue in Long Island City. Since the identity of Blanchard's accomplice was not then known, the appellant Wallace Jarvis was indicted as "John Doe", and a bench warrant was issued for his arrest (H. 222-223).[1]

Prior to trial, appellant moved to suppress palmprint and eyewitness identifications on the ground that they were fruits of an unlawful arrest. Additionally, he moved to suppress the eyewitness identifications on the ground that the identification techniques used were impermissibly suggestive. Judge Pratt held a lengthy hearing on the issues raised by appellant and denied the motions.

1. Appellant's Arrest

Agent Samuel Wichner of the Federal Bureau of Investigation testified that he had appeared as a witness in the Grand Jury that returned the indictment against Michael Blanchard and John Doe and that he had ascertained that there were two bank robbers, both of whom were clearly depicted in bank surveillance photographs, but that only Blanchard had been identified (H. 222-223). At the time of the indictment, Blanchard was

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[1] "H." refers to the transcript of the pre-trial hearing; "Tr." refers to the trial transcript.

already in custody in connection with another bank robbery (H. 227-228, 245). When he was arrested, several documents were seized from him, including a slip of paper with the name "Jay", the address of 173-15 140th Avenue, and a telephone number (H. 227-228, 234-235).

Thereafter, on February 12, 1976, Junius Bowman and another were arrested by state authorities in possession of two hand guns, one of which was stolen during the bank robbery.[2] On April 14, 1976, Barbara Bowman, Junius's mother, contacted the F.B.I. and told them that her sister was the girlfriend of Wallace Jarvis and that Jarvis admitted to Margaret that the two guns taken from Junius Bowman at the time of the latter's arrest had been used in a bank robbery in which Jarvis had participated. Jarvis threatened to kill Margaret if he were arrested for the robbery (H. 224, 227). Barbara Bowman was shown a spread of six surveillance photographs from different bank robberies and identified a picture of the robber who vaulted the counter in the February 2nd robbery as Wallace Jarvis, also known to her as "Jay" (H. 224-227). She gave the agents the appellant's full name and described Jarvis's automobile as an old, grey, four-door car (H. 235, 266).

In addition, Michael Blanchard's wife told the agents that she recognized the man depicted in one of the bank surveillance photographs as someone she had seen her husband with a week before the robbery and that he drove a 1969 four-door Chevrolet which was in poor condition (H. 254).

On April 19, Agent Wichner went to the address which was written on the paper seized from Blanchard and saw

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[2] Neither Junius Bowman nor the man with whom he was arrested was one of the bank robbers.

a 1969 or 1970 four-door grayish-silver Chevrolet parked in the driveway, matching the description of the car given by Barbara Bowman and Mrs. Blanchard (H. 236). Thereafter, on the same day, Agent Wichner presented the evidence concerning Jarvis's identity to the Assistant U.S. Attorney responsible for the case and obtained authorization for the arrest of Jarvis.

On April 20, 1976, at about 1:00 p.m., the agents called Jarvis's house and found that he was at home. Thereafter, Agent Wichner knocked [illegible]dly on the front door of the house, announced himself as "the F.B.I.", stated that he had an arrest warrant and directed the occupants to open the door. When no one did, the agents forced the door open and arrested Jarvis, who strongly resembled the bank robber in the surveillance photographs (H. 241, 268-272, 295).

Appellant moved to suppress a palmprint identification and subsequent eyewitness identifications on the ground that they were the fruits of an allegedly unlawful arrest. In denying the motions, the district court rendered the following oral opinion:

> Gentlemen, yesterday we concluded about a day and a half of hearings on the defendant's motion to suppress certain evidence which may be offered in this case.
>
> The motions seem to break into three parts. First, requested suppression on the grounds that the arrest itself was illegal. That claim is based upon the fact we are dealing here with a John Doe warrant which doesn't on its face describe the identity of John Doe. The defendant argues we may not use extrinsic evidence for purposes of supplementing the warrant itself; that the warrant therefore violates the appropriate rule of the Fed-

eral Rules of Criminal Procedure, is invalid and that everything that flows from the warrant must be suppressed. He includes in what should be suppressed, [a] mug shot which was taken, fingerprints which were taken, the defendant's presence at the lineup and any other statements made by the defendant.

The motion based upon illegality of arrest is denied. I cannot accept the argument that extrinsic evidence may not be used in conjunction with the warrant. Logic compels the conclusion that no piece of paper may identify either a person or place. Extrinsic evidence is always necessary. If you pass the purely formal level of analysis to get the underlying purpose of a warrant, the Fourth Amendments prohibition against unreasonable searches and seizures, you find that in the circumstances here we have a warrant which within the operation of the Government, that is the U.S. Attorney's office, the F.B.I., the Grand Jury, the warrant is clearly and historically here tied to the indictment itself. It charges a specific crime. It is a crime committed by two individuals, one of whom was identified as John Doe rather than as Wallace Jarvis for the reason the name of the individual was not known. In order to take the charged defendant into custody it was necessary, as it always is necessary, to relate the words of the warrant to the body which is to be seized. That, as I said, requires extrinsic evidence. There's no question here but that the extrinsic evidence which was available was sufficient, proper, clear identification of the defendant as the person sought in the warrant. Therefore, the face of the warrant itself, I find it was a valid warrant for purposes of this arrest under these circumstances.

> The argument is made—technically they do not have to reach it—but the argument has been made and for the record so that it will be clear in the event of any appeal which might be taken, that if the warrant is invalid then the arrest here must be held to be illegal because the Constitutional requirement for arrest in a private home must override the authority given to the F.B.I. under 18 U.S. Code 3052, to arrest based on probable cause. Under the circumstancse here, the defendant—we will forget what the defendant might concede. He needs to concede nothing. But the probable cause is clear. The only question remaining being the one left open in United States against Watson where the Supreme Court indicated they were not in that case deciding whether or not a search of a private home under the statutory authority granted would have to be invalidated by the Constitutional provision. Were I to be called upon to decide that question, I would decide the question that the statutory authority is sufficient to authorize this arrest based on the circumstances which face [sic] the F.B.I. It would be authorized under the U.S. Code. So much for the first aspect of the suppression. (H. 391-394).

2. Eyewitness Identification

Appellant also moved to suppress the identification of the appellant by two eyewitnesses. John DiGiacomo, an assistant manager at the bank, testified that he had a good look at the appellant during the robbery and saw his full face unobscured and, indeed, was shoulder to shoulder with the appellant during the robbery (H. 129-132). He further testified that he had a clear impression of the bank robber based on his observation of him during the

robbery and that on April 22, 1976, he picked the appellant's photograph out of a photospread in less than a minute (H. 137-138). Agent Wichner testified that he had made no suggestions as to who in the photospread he suspected was the actual bank robber (H. 104-105, 107). Mr. DiGiacomo also testified that he had made a positive identification of the appellant in a lineup on April 29 and that no one suggested whom he should pick out (H. 141-143).

Edelmira Morales, a bank telier, testified that she saw the robber behind the counter, but she was unable to identify the appellant in a photospread. However, she made a subsequent positive identification of the appellant in the lineup (H. 183-186). Mrs. Morales had previously picked out a picture of Junius Bowman in a photospread as "most closely resembling" the robber behind the counter (H. 57-58). When she viewed the lineup in which Junius Bowman was included with Jarvis, she realized for the first time that her previous tentative identification was incorrect and positively identified appellant as the bank robber (H. 188-192).[3]

At no time prior to making an identification did agents of the F.B.I. suggest to either of the witnesses who the suspect was (H. 104-105, 107). However, after Di Giacomo made an identification, Agent Wichner stated to him that, in his opinion, he had made a correct identification (H. 105).

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[3] Contrary to the assertion in appellant's brief that before the lineup Agent Wichner told Mrs. Morales that her identification of Bowman was incorrect (Appellant's Brief, pp. 36-37, 40), Mrs. Morales testified that she did not realize that Bowman was not the robber until she saw him in the lineup with Jarvis (H. 188-192). The record is devoid of any support for appellant's contrary claim (Tr. 145).

In denying appellant's motion to suppress the eyewitness identification testimony, the district court found that the procedures used were not impermissibly suggestive. Specifically, Judge Pratt found that: (1) both witnesses had a good opportunity to observe the appellant at the bank; (2) both witnesses were certain of their identifications on the first occasion when they made them; (3) the time lapse of eleven weeks between the robbery and the out-of-court identifications was not inordinate under the circumstances and did not render the identifications unreliable; (4) the manner in which the line-up and photospreads were handled was not impermissibly suggestive; and (5) the identifications were not influenced by any statements Agent Wichner may have made to the witnesses after the identifications were made.[4]

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[4] The district court's oral opinion is as follows:

As to the third portion, the motion to suppress the identification testimony of two eyewitnesses, Di Giacomo and Morales, both of these witnesses identified the defendant at the lineup. We have been told both of them will testify at the trial. DiGiacomo also identified the defendant in a photo spread. Morales did not, although given an opportunity to do so she was able [sic] to pick out the defendant from the photo spread. The motion in this respect is denied in all respects. The case law dictates each fact situation must be viewed by itself. The basic test is whether the procedures used in the precourtroom identification procedures were impermissibly suggestive. Weighing the various factors involved, it appears both witnesses had a good opportunity to observe the defendant at the bank. They both were in a position to have paid close atention to him. They dealt with him while he was there. Neither one panicked. They helped him to get the money he was demanding.

* * * * *

As to the prior descriptions of the witness—I'm sorry. As to the prior descriptions given by the witnesses of the defendant on the record thus far before me they are not too clear in either case. I do not find, however, as the

[Footnote continued on following page]

first point was not extensively developed in the testimony, but particularly with the case of Morales who seemed somewhat uncertain as to what description she had given of the robber behind the counter shortly after the event, when the time came when she saw him in person she seemed certain of her identification. The argument of impermissibly suggestive techniques being used by the Government falls particularly with respect to Miss Morales since she looked at a photo spread involving **Mr. Bowman** and said he most likely resembled the defendant of the five or six photographs which were in front of her.

While she was not able to pick out the defendant from the photo spread in April which was given to him [sic] the 22nd, I believe it was, she said in substance something clicked when she saw him in person in the same lineup when Mr. Bowman was there. She clearly distinguished between Mr. Bowman and Mr. Jarvis. Had there been suggestive techniques used, one would expect her to have found Mr. Bowman, to pick him out of the lineup rather than Mr. Jarvis. Both of the witnesses were certain of the identifications which they made on the first occasion when they made them.

One of the witnesses repeated more than once, I forget whether it was Di Giacomo or Morales, used the term positive. I believe it was Mr. Di Giacomo.

Finally, the time lapse between the event and the time of the out-of-court identifications, a matter of approximately eleven weeks, I find that is not an inordinate delay under the circumstances here and does not in my view render the identification made unreliable or under the circumstances of the manner in which the lineup and the photo spreads were handled does it contribute toward making them impermissibly suggestive. Both witnesses testified they had been given no suggestions as to who the right man was. No gestures were made. No instructions were given. I find that testimony to be credible.

The defendant has argued the statements or indications of agreement by Mr. Wichner after the correct identifications were made must necessarily render the line proceeding invalid because those statements alone constitute impermissibly suggestive material. I do not agree under the circumstances as they were described on the witness

[Footnote continued on following page]

B. The Government's Case

According to John DiGiacomo, a bank officer, during the afternoon of February 2, 1976, he was behind the tellers' counter when the appellant and Michael Blanchard entered the Thompson Avenue branch of the European-American Bank. Blanchard covered the customers' area and took the guard's gun. Jarvis, whom DiGiacomo identified in-court, was the individual who vaulted the tellers' counter with a gun in his hand and landed next to DiGiacomo (T. 49-53, 74). He then directed DiGiacomo to

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stand. I do not believe and I find it is not the case that the identifications made by either witness was influenced by whatever indications Mr. Wichner may have given after the identifications were made; that they agreed what I believe he described as his professional opinion who the robber behind the counter was. Neither of the two individuals in question here, Di Giacomo or Morales, appeared to be suggestible-type people.

Di Giacomo was particularly positive in his identification, was clear in his testimony that when he picked the defendant out of the photo spread on April 22nd, he did it based upon his memory of what he saw in the bank February 2nd and he was equally positive when he picked the defendant out of the lineup it was also based on his direct memory of the February 2nd events. I find his testimony to be credible on that point.

Miss Morales, far from being suggestible, was quite an independent person. She thought Bowman most resembled the defendant. She was not told immediately thereafter that the Government disagreed with her, but immediately when she saw the defendant in the same lineup with Bowman she quickly picked out the defendant. She had no hesitation or doubt about it.

In short, I find there is nothing in the circumstances which were developed before me to show improper suggestion to either of the witnesses or any indication of influence on either witnesses' identification as a result of the procedure used. (H. 395-399).

put money from the tellers' drawers in a bag (T. 55-56). Edelmira Morales, a teller, also made an in-court identification of the appellant as the bank robber who had vaulted the counter (T. 139, 144). She too was behind the counter at the time (T. 137-138).

Both DiGiacomo and Morales testified to their out-of-court identifications of Jarvis. Bank surveillance pictures were introduced in evidence. These photographs showed a robber behind the counter who clearly resembled the appellant. (T. 69).

Agent Thomas Lagatol testified that immediately after the robbery he lifted a palmprint from the glass partition at the first teller's position (T. 188-190). An F.B.I. fingerprint expert, Ronald Hurt, testified that in his opinion the palmprint was that of Wallace Jarvis (T. 210-214).

Margaret Bowman testified that on February 12, 1976, she and Jarvis, who was then her boyfriend, were at her apartment. Ms. Bowman received a telephone call from her sister, who told her that Junius Bowman, Margaret's nephew, had been arrested in the possession of some guns. Ms. Bowman related the conversation to Jarvis. Jarvis ran into the kitchen and opened a metal box, which he took from behind the stove. The box was empty. Appellant then announced to Ms. Bowman that he had used the guns in a bank robbery; he then beat her up and threatened her with more harm if she said anything about his having participated in the robbery (T. 249-251).

Junius Bowman testified that he had found the guns behind the stove (T. 415). It was stipulated that one of the guns was taken from the bank guard during the February 2nd robbery.

The loss of $4,700 and the fact that the bank was insured by the Federal Deposit Insurance Corporation were stipulated to.

C. The Defense Case

The defense called Robert Buckhout, a psychologist, who explained the potential weakness of eyewitness testimony and further explained the factors which in his opinion could result in a misidentification. However, this expert witness testified that he had not interviewed or tested the two eyewitnesses called by the Government (T. 500-501). Another defense expert witness, Patrick Fusci, a fingerprint specialist, confirmed that the palmprint belonged to the appellant (T. 515).

The defendant took the stand and denied his involvement in the robbery. However, he could not account for his whereabouts on February 2, 1976 (T. 516-559).

The defense also called a character witness, Richard Granath, who stated that he had known the appellant for a year and a half in connection with a food franchising operation with which they were both involved (T. 567-569).

ARGUMENT

POINT I

The District Court Properly Denied Appellant's Motion To Suppress The Palmprint And Photographic Identification Testimony.

I. Introduction

In the afternoon of April 20, 1976, the appellant was arrested inside his house after a "John Doe" bench warrant had been issued for his arrest. It is undisputed that the arresting agents had probable cause to make the arrest. Nevertheless, appellant urges this Court to declare the arrest unlawful on the ground that the arrest warrant in the name "John Doe" was allegedly invalid. Thus, the appellant asks the Court to depart from the "traditional and almost universal standard for arrest without a warrant" [5] and hold that, absent exigent circumstances, a warrantless arrest in a private dwelling, where the arresting officers have reasonable cause to believe that the person they seek to arrest has committed a felony, violates the Fourth Amendment. Appellant further argues that evidence based on a palmprint and photographs of the appellant taken following his arrest should be suppressed as "fruits" of an unlawful arrest.

2. The arrest was lawful

It is uncontested that there was probable cause to arrest the appellant. Barbara Bowman had identified

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[5] ALI, Model Code of Pre-arraignment Procedure (1975) quoted with approval in *United States* v. *Watson*, 423 U.S. 411, 422 (1976).

a bank surveillance picture as that of Wallace Jarvis, had told the F.B.I. his nickname, "Jay", and had described his car. Appellant's accomplice had been arrested in possession of a slip of paper with the name "Jay" and an address on it, and the F.B.I. found a car matching the description given by Bowman and an additional witness parked in the driveway of appellant's house at the address written on the slip of paper.

Arrests by F.B.I. agents without a warrant in private dwellings based on probable cause alone are authorized by Title 18, United States Code, Section 3052, which provides, in pertinent part:

> [A]gents of the Federal Bureau of Investigation of the Department of Justice may . . . make arrests *without warrant* for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony. (Emphasis added.)

In *United States* v. *Watson*, 423 U.S. 411 (1976), the Supreme Court upheld a virtually identical statute authorizing Postal Inspectors to make warrantless arrests based on probable cause (18 U.S.C. § 3061). As the Court stated:

> Section 3061 represents a judgment by Congress that it is not unreasonable under the Fourth Amendment for postal inspectors to arrest without a warrant provided they have probable cause to do so. This was not an isolated or quixotic judgment of the legislative branch. Other federal law enforcement officers have been expressly authorized by statute for many years to make felony arrests

> on probable cause but without a warrant. This is true of United States marshals, 18 U.S.C. § 3053, and of agents of the Federal Bureau of Investigation, 18 U.S.C. § 3052; the Drug Enforcement Administration, 84 Stat. 1273, 21 U.S.C. § 878; the Secret Service, 18 U.S.C. § 3056(a); and the Customs Service, 26 U.S.C. § 7607.
>
> Because there is a "strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is 'reasonable,'" [o]bviously the Court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the Act was therefore unconstitutional." *United States* v. *Di Re*, 332 U.S. 581, 585 (1948). Moreover, there is nothing in the Court's prior cases indicating that under the Fourth Amendment a warrant is required to make a valid arrest for a felony. Indeed, the relevant prior decisions are uniformly to the contrary.

411 U.S. at 415-417.

The standard authorizing a law enforcement officer to arrest a person without a warrant in a private dwelling if the officer has reasonable cause to believe that such a person has committed a felony, whether exigent circumstances exist or not, is almost universal. *United States* v. *Watson*, *supra*, 425 U.S. at 422. In *United States* v. *Price*, 345 F.2d 256 (2d Cir. 1965), *cert. denied*, 382 U.S. 949, this Court upheld a warrantless arrest in a private dwelling by Treasury agents acting under statutory authority substantially identical to 18 U.S.C. § 3052. *See also*, *United States* v. *Burnett*, 526 F.2d 911 (5th Cir. 1976). *But see*, *Dorman* v. *United States*, 435 F.2d 385 (D.C. Cir. 1970); *United States* v. *Shye*, 492 F.2d 886 (6th Cir. 1974); and *Vance* v. *North Carolina*, 432 F.2d 984 (4th Cir. 1970).

In the absence of a federal statute delineating the authority of the arresting agents, the law of the state where the warrantless arrest takes place determines the validity of the arrest. *United States* v. *Watson*, *supra*, 423 U.S. at 420, n. 8. New York law expressly authorizes police officers to make warrantless arrests in private dwellings based on probable cause. N.Y. CPL § 140.15.[6]

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[6] The statute reads in pertinent part:

> Arrest without a warrant; when and how made by police officer
>
> 1. A Police officer may arrest a person for an offense, pursuant to section 140.10, at any hour of any day or night.
>
> * * * * *
>
> 4. In order to effect such an arrest, a police officer may enter *premises* in which he reasonably believes such person to be present, under the same circumstances and in the same manner as would be authorized, by the provisions of subdivisions four and five of section 120.80, if he were attempting to make such arrest pursuant to a warrant of arrest. (Emphasis added).

Section 140.10(1) reads as follows:

> 1. Subject to the provisions of subdivision two, a police officer may arrest a person for:
>
> (a) Any offense when he has reasonable cause to believe that such person has committed such offense in his presence; and
>
> (b) A crime when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise.

The New York Court of Appeals has held that police officers may effect warrantless arrests in private dwellings. *People* v. *Floyd*, 26 N.Y. 2d 558 (1970); *People* v. *Gallman*, 19 N.Y. 2d 389 (1967), *cert. denied*, 390 U.S. 911.

Appellant's contention is that the arrest was unlawful because, even though the agents had probable cause and, moreover, had a bench warrant for his arrest, the warrant was invalid because it did not name or describe the defendant except as "John Doe".

Appellant relies on *West* v. *Cabell*, 153 U.S. 78 (1894) and *United States* v. *Swanner*, 327 F. Supp. 69 (E.D. Tenn. 1964), for the proposition that a warrant which describes the crime but does not name or describe the defendant except as "John Doe" is invalid *per se* and cannot be validated by extrinsic evidence. In both *West* and *Swanner*, the police arrested someone other than the person named in the warrant and without probable cause. Here there was ample probable cause to believe that the appellant was the person sought in the warrant.

While this Court need not reach the issue of the validity of the John Doe warrant, we note that the proposition urged by appellant that the validity of a warrant cannot be judged by reference to extrinsic evidence does not withstand analysis.

As the district court observed:

> I cannot accept the argument that extrinsic evidence may not be used in conjunction with the warrant. Logic compels the conclusion that no piece of paper may identify either a person or place. Extrinsic evidence is always necessary. . . . In order to take the charged defendant into custody it was necessary, as it always is necessary, to relate the words of the warrant to the body which is to be seized. That, as I said, requires extrinsic evidence. There's no question here but that the extrinsic evidence which was available

was sufficient, proper, clear identification of the defendant as the person sought in the warrant.[7]

(H. 391-393).

3. In no event should the palmprint and photographic identification testimony be suppressed

After the appellant's arrest, the agents took his photograph and a set of major case prints. The photograph was included in a photospread which Agent Wichner showed to John DiGiacomo, who identified Jarvis as the bank robber.[8] The major case prints were compared with the latent prints lifted from surfaces in the bank. One latent palmprint was found to be Jarvis's.

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[7] Although, Rule 4(c) of the Federal Rules of Criminal Procedure requires a description of the person sought by which he can be identified with reasonable certainty, one would be hard put to describe any person whose name was in terms that would allow him to be identified with "reasonable certainty." Read literally, Rule 4(c) would invalidate virtually all "John Doe" warrants. Indeed, the best safeguard against arresting the wrong man is the requirement of sufficient extrinsic evidence relating the person sought to the body seized, not simply a name appearing on the face of the warrant. *See, United States* v. *Rosario*, 543 F.2d 6 (2d Cir. 1976). Here the arresting agents went to great lengths to insure that they had the right man.

Even assuming that the John Doe warrant was invalid, the arresting agents' conduct was not unreasonable because they did not obtain a warrant in appellant's name. They obtained what they believed to be a valid bench warrant, the offense was a grave one, there was reason to believe that appellant was armed, there was a clear showing of probable cause, the agents knew the suspect was in the house, the entry was made during the day, and the agents identified themselves and their mission before entering. *See, Dorman* v. *United States*, 435 F.2d 385, 392-393 (D.C. Cir. 1970).

[8] Mr. DiGiacomo also identified the appellant in a subsequent lineup and in court.

Appellant argues that the DiGiacomo photographic identification and the palmprint identification should be suppressed as "fruits" of an unlawful arrest. Even assuming that the arrest was unlawful, there is no basis for excluding such evidence. As this Court recently held in *United States* v. *Galante*, — F.2d —, Slip Op. 959 (2d Cir. decided December 14, 1976), "[t]he mere fact that an invalid warrant was obtained will not, standing alone, invalidate a subsequent seizure." at 970-971.

In *Galante*, the Court held that the question of admissibility of evidence obtained in an illegal search depends on whether the illegal search was the "but-for" cause of the seizure. The same reasoning is applicable here.

No matter where or under what circumstances Jarvis had been arrested, the F.B.I. would inevitably have obtained his photograph and palmprint. Indeed, the evidence could just as easily have been obtained at any time prior to trial. This is not a case where the evidence obtained without a warrant in any way contributed to the probable cause justifying the arrest. See, *United States* v. *Ceccolini*, 542 F.2d 136 (2d Cir. 1976). It cannot be argued that "but for" the arrest *in* appellant's house, the evidence would not have been discovered. Had he been arrested *outside* of his house, the evidence would just as inevitably have been discovered.

Moreover, the suppression of the evidence would not deter any improper police conduct, for here the evidence was in no sense an outgrowth of the alleged illegality and the agents had probable cause and a good faith belief that they had a valid arrest warrant. Not only did they have the warrant, but they sought and obtained authorization from an Assistant United States Attorney before making the arrest.

POINT II

The District Court Properly Denied Appellant's Motion To Exclude Eyewitness Identification Testimony.

Before trial, the appellant moved to exclude eyewitness identification testimony on the ground that "the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States*, 390 U.S. 377, 384 (1968). After an extensive hearing, the district court denied the motion.

On appeal, appellant contends that the district court erred because the identifications were tainted by statements that an agent might have made to eyewitnesses *after* they made an identification.

On February 23, 1976, Edelmira Morales viewed a photospread which included a picture of Junius Bowman (but not of Jarvis) and five other photographs. She told Agent Wichner that, of the six, Bowman most closely resembled the robber behind the counter. Agent Wichner said nothing to her in response (H. 84). On April 22, Wichner showed Mrs. Morales another spread with a picture of Jarvis. She failed to identify anyone. On April 29, Mrs. Morales viewed a lineup and positively identified Jarvis as the robber.

Appellant asserts, without any support in the record, that, prior to viewing the lineup, agents told Mrs. Morales that her choice of Bowman was wrong. That never happened. Indeed, Mrs. Morales testified that she thought Bowman was the robber until she saw him in the lineup with Jarvis and recognized Jarvis as the robber (H. 191-192; T. 145).

Appellant also argues that Mrs. Morales's viewing of the photospread containing a photograph of Jarvis constituted an impermissible suggestion which could likely result in a misidentification at the lineup. As Judge Pratt perceptively noted, "Had these been suggestive techniques used, one would expect her to have found Mr. Bowman, to pick him out of the lineup rather than Mr. Jarvis." (H. 397). The court made the following findings, among others, with respect to Mrs. Morales:

> Miss Morales, far from being suggestive, was quite an independent person. She thought Bowman most resembled the defendant. She was not told immediately thereafter that the Government disagreed with her, but immediately when she saw the defendant in the same lineup with Bowman she quickly picked out the defendant. She had no hesitation or doubt about it.

(H. 399).

John DiGiacomo viewed a photospread containing a photograph of the appellant on April 22 and immediately identified Jarvis as the robber behind the counter. He also viewed a lineup on April 29 and, again, identified Jarvis. Appellant now argues that DiGiacomo's lineup and in-court identifications were tainted by reason of the fact that he was shown the photospread before hand and that Agent Wichner told him that, in his opinion, he had picked the right man.

While we concede that the better practice would be for agents to say nothing, the evidence at the hearing showed that DiGiacomo's first identification was *positive* as were his subsequent identifications and that they were based on his observation of the appellant during the robbery and not on Agent Wichner's post-photospread

comment agreeing with the selection.[9] As Judge Pratt found:

> [I]t appears both witnesses [DiGiacomo and Morales] had a good opportunity to observe the defendant at the bank. They both were in a position to have paid close atention to him. They dealt with him while he was there. Neither one panicked. They helped him to get the money he was demanding.

(H. 396).

* * * * *

> The defendant has argued the statements or indications of agreement by Mr. Wichner after the correct identifications were made must necessarily render the entire proceedings invalid because those statements alone constitute impermissibly suggestive material. I do not agree under the circumstances as they were described on the wit-

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[9] In *United States* v. *Russell*, 532 F.2d 1063 (6th Cir. 1976), a witness who made only a tentative identification was told that it was correct. As the court stated:

> Her identification of the photographs she selected was *not positive*. However, the agent told her that the photograph she had selected was "the guy we think probably did it," confirming her selection. We do not condone this practice, which might in some circumstances make firm a doubtful and mistaken identification, but we cannot say that the trial judge erred in concluding that no substantial likelihood of misidentification resulted. Mrs. Rida had already selected the photograph she believed to be the robber before the suggestive comment was made. (Emphasis added). 532 F.2d at 1067-1068.

Here, Mr. DiGiacomo made a positive identification before the agent told him that in his view the choice was correct. As for Mrs. Morales, there is nothing in the record to suggest that the agent ever expressed an opinion about her identification until after the lineup.

> ness stand. I do not believe and I find it is not the case that the identifications made by either witness was influenced by whatever indications Mr. Wichner may have given after the identifications were made, that they agreed [with] what I believe he described as his professional opinion who the robber behind the counter was. Neither of the two individuals in question here, Di Giacomo or Morales, appeared to be suggestible-type people.
>
> Di Giacomo was particularly positive in his identification, was clear in his testimony that when he picked the defendant out of the photo spread on April 22nd, he did it based upon his memory of what he saw in the bank February 2nd and he was equally positive [that] when he picked the defendant out of the lineup it was also based on his direct memory of the February 2nd events. I find his testimony to be credible on that point.

(H. 398-399).

Significantly, appellant cites no cases in support of the proposition that it is impermissibly suggestive for an agent to tell a witness *after* he has made an identification that in the agent's opinion it is a correct one. This is not a case in which a suggestion was made *before* the identification. *See, Foster* v. *California*, 394 U.S. 440 (1969).

In *Simmons* v. *United States*, *supra*, 390 U.S. 377, the Supreme Court held that the danger that the use of photographs for initial identification "may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error." 390 U.S. at 384. Here, not only did appellant's counsel cross-examine the eyewitnesses at great length in an

attempt to discredit their identifications, but the appellant also called Robert Buckhout, a psychologist, as an expert in eyewitness identification, who testified concerning the factors which may contribute to a misidentification—the very factors that counsel attempted to establish on cross-examination obtained in the DiGiacomo and Morales identifications. Thus, appellant's contention that the identification procedures might have caused misidentifications was fully developed for the jury through cross-examination and the testimony of Dr. Buckhout.

As Judge Pratt held:

> In short, I find there is nothing in the circumstances which were developed before me to show improper suggestion to either of the witnesses or any indication of influence on either witnesses' identification as a result of the procedures used.[10]

(H. 399).

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[10] Appellant also objected to Agent Wichner's practice of showing bank surveillance pictures to the witnesses before showing them a photospread. As Judge Pratt found, that procedure did not cause the witnesses to look for similarities between the surveillance pictures and the mug shots. Rather, the only positive photospread identification—DiGiacomo's—was based on his clear recollection of his observation of the appellant during the robbery (H. 399).

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
February 23, 1977

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

BERNARD J. FRIED,
JONATHAN M. MARKS,
Assistant United States Attorneys,
*Of Counsel.**

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* The United States Attorney's Office acknowledges the valuable assistance of Michael Levine, a third year law student at Brooklyn Law School, in the preparation of this brief.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

CAROLYN N. JOHNSON, being duly sworn, says that on the 25th day of February, 1977, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~a~~ xx two copies of the Brief for the Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Guy L. Heinemann, Esq.
410 Park Avenue
New York, New York 10022

Sworn to before me this
25th day of February, 1977

Sylvia E. Morris

SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4503861
Qualified in Kings County
Commission Expires March 30, 1977

Carolyn N. Johnson

CAROLYN N. JOHNSON

OTICE that the within
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Plaza East, Brooklyn,
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UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

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United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____
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Dated: _____, 19____

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Attorney for _____

FPI-LC-5M-8-73-7355